(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a).

STATEMENT

A. Petitioners' Property.

The property at issue in this case is a 19.6-acre parcel in Chesterfield Township, Macomb County, Michigan, lying approximately a mile northwest of Lake St. Clair and less than a mile southeast of the intersection of Interstate 94 and 23 Mile Road. Pet. App. 2a. It is surrounded by residential subdivisions and apartment and condominium complexes, and numerous strip malls and other commercial development can be found to the north of the property, along 23 Mile Road. *See id.* Immediately southeast of the property is "Sebille Manor," a housing facility for military personnel. *See* 6th Cir. Joint Appendix 489. Sebille Manor is associated with the Selfridge Air

National Guard airfield, which is approximately two miles to the south of the property. *See* http://www.selfridge.army.mil/Housing.htm. Approximately fifteen acres of the property are forested wetland. Pet. App. 2a.

The property is shaped roughly like an inverted right triangle, with one leg running from north to south, along Donner Road, and the other leg running at a right angle, from east to west. Pet. App. 21a. The hypotenuse of the triangle runs from the northeast to the southwest, and there is a ditch that borders the property along the hypotenuse, running for approximately 1,800 feet and eventually connecting at its northeast end to the Sutheland-Oemig drain. *Id.* This drain is part of Macomb County's sanitary drain system, and it runs through Sebille Manor and eventually connects to Auvase Creek, which empties into Lake St. Clair. Pet. App. 2a; http://www.macombcountymi.gov/gis/images/county-maintained-drains-map.pdf. A berm runs along the west side of the ditch, forming a barrier between the wetland and the ditch. Pet. App. 3a. The berm was apparently formed more than fifty years ago by the sidecasting of spoils during the excavation of the ditch, and the ditch was apparently created in connection with the construction of the housing at Sebille Manor. *See* Pet. App. 62a.

The property retains water at various times during the year because the berm prevents surface water from draining off the property and into the ditch and because the soils on the property are comprised of dense clay, which drains poorly. There is no dispute in the record that the property lacks a surface or ground water connection to the ditch or to any other body of

navigable or non-navigable water. J.A. 36a-37a, 40a, 82a-83a, 99a-100a.

Respondents have previously argued that "the wetland on Petitioners' tract has at least an occasional hydrologic connection to . . . Lake St. Clair, a traditional navigable water" because Respondent United States Army Corps of Engineers (the Corps) found – and the lower courts agreed – that a berm prevents the "immediate drainage" of the wetland to an adjacent tributary of Lake St. Clair. *See* Brief in Opposition 9. This statement does not accurately describe the evidence in the administrative record or the findings by either the Corps or the lower courts.

In fact, the Corps actually made contrary findings. In its own fact-finding process here, the Corps determined that "the parcel is not currently part of the S[utherland]-O[emig] Drain watershed." J.A. 99a-100a. Moreover, the Corps specifically acknowledged that the wetland is isolated from any other water by asserting that "berms and other features . . . presently isolate the wetland from the S-O Drain and receiving waters." J.A. 106a. Similarly, during an administrative hearing, an official of the Corps asserted that, with respect to the wetland, "right now there is no outflow. Essentially it is off-line, if you will." J.A. 185a-187a. Thus, the Corps found that the wetland was not part of the watershed for the Sutherland-Oemig drain, and, therefore, that there is no ground or surface water connection between Petitioners' wetland and any tributary of a navigable water.[1]

---

[1] Respondents have previously attempted to obscure the Corps' finding in two ways. First, they have hypothecated that it might be possible for water to accumulate in the wetland so that it

B. Proceedings Before the State Administrative Agency.

In 1993, Petitioners applied to the Michigan Department of Environmental Quality (MDEQ) for a permit to fill the forested area of the property for the purpose of building 130 condominium units, along with the associated roads and utilities. J. A. 27a-29a. The MDEQ initially denied the application, but Petitioners subsequently filed an alternative plan, seeking to fill only 12.2 acres and build 112 condominium units. J.A. 29a. The alternative plan also proposed to construct enhanced and functional wetlands on 3.74 acres of the property, which would filter any water draining across the property. *Id.* The MDEQ conducted a contested-

---

overtopped the berm. Respondents' Court of Appeals Brief at 8. The problem with this speculation is that it is not based upon any evidence in the record or upon any finding made by the Corps or the district court; it is a purely theoretical assertion. Second, Respondents have contended that, during the administrative appeal hearings, Petitioners' counsel conceded that water from the wetland could enter the Sutherland-Oemig Drain by overtopping the berm or flowing through drainage cuts in the berm. Brief in Opposition at 9-10. This characterization of statements by Petitioners' counsel is inaccurate. In the portion of the administrative appeal hearing cited by Respondents, the parties discussed Petitioners' development plan for their property, specifically, their proposal of a water retention pond as a part of that plan. Reciting the various advantages of the plan, Petitioners' counsel noted that the proposed water retention pond would actually have a greater capacity for holding water run-off from neighboring properties than the existing wetland. J.A. 184a-188a. Petitioners' counsel never asserted that water had ever overtopped the berm or otherwise flowed from the wetland into the Sutherland-Oemig Drain; he asserted that the theoretical water-holding capacity of the proposed retention pond was greater than the theoretical water-holding capacity of the existing wetland. *Id.*

case hearing on the alternative plan, which included several days of testimony. J.A. 24a. During this hearing, Petitioners and the MDEQ submitted extensive testimonial and documentary evidence, and the MDEQ issued a proposed decision in August 1998, recommending the issuance of the permit. J.A. 23a-43a. Crucial to this recommendation was the fact that the wetland was isolated from any body of water:

> This opinion is premised on the fact the wetland does not have a surface water connection to adjacent properties or any body of water, and the property to the immediate north is isolated by a retention pond. Furthermore, the drainage ditch along Donner Road prevents a discharge of water both to and from the site, and the Sutherland-Oemig drain is bermed, which prevents the discharge of water either into it or from the drain.

J.A. 36a. A Final Determination and Order embodying the proposed decision was issued on September 30, 1998. J.A. 50a-59a.

C. Proceedings Before the Corps.

In November 1998, acting pursuant to 33 U.S.C. § 1344, the EPA notified the MDEQ that it objected to the issuance of the permit to Petitioners, and it asserted federal jurisdiction over the case on the ground that the property was a wetland that was adjacent to the navigable waters of the United States. Also pursuant to § 1344, the EPA authorized the Corps to determine whether a federal permit should issue to allow the proposed development. Although Petitioners

contested federal jurisdiction, they nevertheless submitted a permit application to the Corps.

The Corps initially conducted a "Permit Evaluation," which was based upon three site inspections. One of the site inspections was documented in a report dated May 5, 2000. J.A. 81a-83a. This report specifically focused on the question of federal jurisdiction over the wetland on the property. The report did not identify any hydrological connection with any waterway, merely noting that the site is adjacent to the Sutherland-Oemig drain. J.A. 82a-83a. In addition, the report "determined that the site does support intestate commerce." J.A. 82a. The report also concluded that the waterway was not navigable and was not a tributary to navigable water. *Id.* In the permit evaluation, which followed this report, the Corps did not specifically address the question whether the wetland had any surface or groundwater connection with the Sutherland-Oemig drain, or with any other body of water, focusing instead on the wetland's function as a habitat for migratory birds. J.A. 93a-94a, 103a-105a. Indeed the Corps speculated about whether there was a physical connection between the wetland and Lake St. Clair:

> [d]ue to the fact that the influence of Lake St. Clair has been documented on the nearby Salt River over a mile up the reaches of the river (to 23 Mile Road), it is likely that the same influence is realized on the Auvase Creek, and continuing up the Sutherland-Oemig Drain that distance in the landscape, as well.

J.A. 92a.[2]

On the basis of this permit evaluation, the Corps denied Petitioners' application on October 5, 2000. J.A. 127a-129a. In a memorandum, which was attached to the Corps' decision letter, the Corps' District Engineer, Lt. Col. Richard J. Polo, Jr., relied upon the permit evaluation's finding that the property was a valuable seasonal habitat for aquatic organisms and a year-round habitat for terrestrial organisms, such as migratory birds, and that it was one of the last forested "stopover points" for migratory birds near the open water of Lake St. Clair. J.A. 131a-132a. Consequently, the Corps' decision gave significant weight to the importance of the wetlands as a habitat for migratory birds. J.A. 103a-105a.

On December 1, 2000, Petitioners submitted a request for an administrative appeal. In the appeal, the Corps asserted that its jurisdiction was derived from § 1344 and 33 C.F.R. § 328.3(a) solely because the property was a wetland that was adjacent to the waters of the United States. J.A. 212a-215a. The Corps disclaimed jurisdiction under any other statute or regulation, and specifically abandoned its prior reliance the Migratory Bird Rule. *Id.* The Corps denied Petitioners' appeal on March 5, 2001. J.A. 210a-219a. Ironically, in denying Petitioners' Appeal, the Corps never reached any conclusions about whether there was any hydrological connection between the wetland and the watershed, relying entirely upon the fact that the wetland was physically proximate to a drainage ditch. J.A. 212a-215a.

---

[2] In the administrative appeal, this speculation was specifically rejected by the Corps. J.A. 216a.

D. Proceedings in the Lower Courts.

Petitioners challenged the Corps' decision in the district court. Ruling on the parties' cross-motions for summary judgment, the district court adopted the report and recommendation of a magistrate judge and ruled that the Corps was correct in asserting jurisdiction over the wetland under 33 C.F.R. § 328.3(a)(7), which extends Clean Water Act authority to "wetlands adjacent" to navigable waters and their tributaries. Pet. App. 20a-57a. The district court acknowledged that, in *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court had ruled that the Act regulated only those waters that had a "significant nexus" with the "waters of the United States," and it concluded that the wetland on the property had such a "significant nexus" and that Petitioners' property "is in fact not isolated, and is subject to the jurisdiction of the [Clean Water Act]." Pet. App. 49a. But the district court did not identify what constituted the "significant nexus" in this case, nor did it address the significance, if any, of the undisputed fact that the wetland lacked any hydrological connection with any of the navigable waters of the United States. The district court simply concluded that the physical proximity of the wetland to the drainage ditch and/or to the Sutherland-Oemig drain was sufficient to satisfy the regulatory requirement of adjacency and that, therefore, the Corps properly asserted jurisdiction over the wetland. *Id.*

On appeal to the Sixth Circuit, Petitioners reiterated their argument that their property was not subject to federal jurisdiction under the Clean Water Act because it did not have a significant nexus with a

navigable water. The Sixth Circuit rejected this argument by concluding that the physical adjacency of the wetland to a tributary of a federal water was sufficient, in itself, to create federal jurisdiction. Pet. App. 12a.

The Sixth Circuit began its analysis by noting that the Corps' interpretation of its own regulations was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 6a-7a. Applying 33 C.F.R. § 328.3(a)(7), the Sixth Circuit reasoned that the existence of the berm separating the property from the drainage ditch did not prevent federal jurisdiction because, under that regulation, the definition of "adjacent wetlands" includes a wetland that is separated by a berm or man-made barriers from a tributary of federal waters. Pet. App. 9a. The Sixth Circuit then noted that this reading of § 328.3(a)(7) was not affected by this Court's decision in *SWANCC*. Pet. App. 10a. According to the Sixth Circuit, most federal circuit courts, with the exception of the Fifth Circuit, have held that *SWANCC* should be narrowly applied, only precluding federal jurisdiction over isolated waters under the Migratory Bird Rule. *Id.* Thus, the Sixth Circuit concluded that this Court's decision in *SWANCC* did not alter the broad definition of "adjacent wetlands," which, in the Sixth Circuit's view, was set forth in this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). Pet. App. 10a-12a. Under that definition, the Sixth Circuit held that the district court did not err in finding that Petitioners' property did not contain isolated wetlands and that it had a "significant nexus" with federal waters. Pet. App. 12a. In reaching this holding, the Sixth Circuit, like the district court, did

not, however, precisely explain what characteristic of the wetland provided this "significant nexus." *See id.*

SUMMARY OF ARGUMENT

I. In *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court held that the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), was enacted under Congress' authority to regulate the navigable waters of the United States. Applying well-established principles regarding the scope of that authority, the *SWANCC* Court held that federal jurisdiction under § 404(a) of the Act extends only to waters or wetlands that have a "significant nexus" with the navigable waters of the United States. *SWANCC*, 531 U.S. at 167. The plain language of the CWA and the overwhelming weight of federal case law, including numerous decisions of this Court, establish that no "significant nexus" can ever exist in the absence of a physical connection, such as a surface or ground water connection, with the navigable waters of the United States. While federal authority under the CWA may extend to some non-navigable tributaries of the navigable waters, it cannot, in any event, extend to a wetland that is hydrologically isolated from the navigable waters.

In this case, the Sixth Circuit has held, and Respondents argue, that a "significant nexus" can exist even in the absence of a hydrological connection, relying upon a regulation promulgated by the Corps, 33 C.F.R. § 328.3(a)(7), which extends federal authority to "wetlands adjacent" to navigable waters and their tributaries. Contrary to the Sixth Circuit's ruling, and to Respondents' position, the regulatory concept of

"adjacent wetlands" cannot be applied to wetlands that are merely proximate to a non-navigable tributary of a navigable water and that lack a surface or ground water connection to navigable waters. For the purposes of the statute and the attendant regulations, a hydrological connection is a necessary condition for finding that a wetland is "adjacent" to a navigable water, and the Corps lacks the authority to apply the Act to regulate any wetland without such a connection. Because the terms of the Act are clear in limiting the scope of federal authority to regulate waters and wetlands, the Corps is not entitled to any deference in its interpretation of the Act and its application of the Act through its regulations and the enforcement of those regulations.

II. If the Clean Water Act is interpreted to permit the exercise of federal jurisdiction over hydrologically isolated, intrastate wetlands, it exceeds the authority created by the Commerce Clause. For the reasons asserted in the previous argument, the authority to regulate such isolated wetlands cannot arise from the federal power over navigation, which is founded in the Commerce Clause. Similarly, the Commerce Clause's more general power to regulate economic activities that substantially affect interstate commerce cannot be the source of authority to control the filling and dredging of isolated wetlands. Such conduct does not, in itself, substantially affect interstate commerce. Moreover, there is no intelligible jurisdiction principle in the Act or its attendant regulations. Consequently, if this Court concludes that the Corps has lawfully interpreted and applied the Act in this case, it should hold that the Act exceeds Congress' general commerce power.

ARGUMENT

I. UNDER THE PRINCIPLES LIMITING FEDERAL AUTHORITY OVER NAVIGATION, WHICH WERE REAFFIRMED IN *SWANCC*, FEDERAL AUTHORITY UNDER THE CLEAN WATER ACT CANNOT EXTEND TO WATERS OR WETLANDS THAT LACK A HYDROLOGICAL CONNECTION TO THE NAVIGABLE WATERS OF THE UNITED STATES.

The Sixth Circuit's ruling here is erroneous and should be reversed because it impoverishes the meaning of the statutory terms "navigable waters" and "waters of the United States," and it gives the Corps extraordinary power to regulate matters that have traditionally been exclusively reserved for regulation by the States. If the Corps may regulate any wetland that is near – but not physically connected to – a non-navigable tributary of navigable waters, the Corps will extend federal authority over an enormous expanse of land, all of which lacks a meaningful connection to the Nation's navigable waters. Because such a grant of authority has no relationship to the Clean Water Act's fundamental purpose of protecting the Nation's navigable waters, it is inconsistent with the authority created by the Act. In addition, through this authority, the Corps will effectively exercise a wide-ranging federal police power over all kinds of land use. A saturated portion of a residential lawn, which is near a storm drain, or an area of standing water in a farm field, which is near a drainage ditch, will come within the scope of § 404(a) of the Act, and the owners of such land will have to obtain permits from the Corps before

making a variety of ordinary land-use decisions. Such an extension of federal authority usurps authority that has traditionally been conferred upon the States and is entirely inconsistent with both the language of the Act and this Court's decision in *SWANCC*.

A. The Scope of Federal Authority to Regulate the Navigable Waters of the United States.

In this case, the Corps' decision to prevent Petitioners from developing their property depended upon Section 404(a) of the CWA, 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), which regulates the discharge of dredged or fill material into "the navigable waters." Under § 502(7), the CWA defines "navigable waters" as "waters of the Untied States, including territorial seas." 33 U.S.C. § 1362(7). Consequently, the dispositive question in this case is whether a hydrologically isolated wetland can be classified as one of the "navigable waters" or as one of the "waters of the United States" for the purposes of the CWA. The interpretation of these crucial statutory terms must begin with a consideration of their plain meaning. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). If the meaning of a statutory term is clear, "'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

At the time of the CWA's enactment, the term "navigable waters" had a specific, well-established meaning in federal law, denoting those rivers, lakes, streams, and other bodies of water that were used for navigation in interstate commerce or that could be so

used in the future, after reasonably anticipated improvements. *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940). This meaning must control the interpretation of "navigable waters" in the context of the CWA because "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). This Court has already held that the CWA does not include any statement demonstrating that Congress intended to depart from or expand upon the traditional meaning of "navigable waters" for the purposes of the CWA. *See SWANCC*, 531 U.S. at 169-72. At the time of CWA's enactment, even the Corps concluded that "navigable waters" referred to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (quoted in *SWANCC*, 531 U.S. at 168). Even though the Corps subsequently adopted a more expansive definition of "navigable waters," this Court concluded that Congress neither adopted nor acquiesced in that definition when it amended the CWA and that the traditional meaning of "navigable waters" still controlled the interpretation and application of the statute. *SWANCC*, 531 U.S. at 172.

When Congress regulates the "navigable waters," it exercises its authority to regulate interstate commerce under Article I, Section 8, Clause 3 of the Constitution. This authority involves the power of the United States "to secure the uninterrupted navigability

of all navigable streams within the limits of the United States." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). More specifically, "the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country." *Id.* In regulating this "continued highway," *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563-64 (1870), the federal government's primary object is to prevent "any interference with the country's water assets" and to assure that the navigable waters always have a sufficient flow of water to permit their use in commerce. *Appalachian Elec. Power Co.*, 311 U.S. at 405-07. Thus, federal navigation power may extend to non-navigable waters that are physically connected to the navigable waters and that are capable of being actually navigable in the future through improvements anticipated in the ordinary course of events. *The Daniel Ball*, 77 U.S. at 563; *Appalachian Elec. Power Co.*, 311 U.S. at 406. In addition, the federal government may regulate the non-navigable tributaries of the navigable waters, to the extent necessary to protect the capacity and integrity of the channels of navigation. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941); *see also United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960).

Although the federal government's power to regulate navigable waters comes from the same source as the general power to regulate economic activities that substantially affect interstate commerce, the power over navigable waters has a more limited scope, and this authority must be balanced against the States' police power over land and water use. *SWANCC*, 531

U.S. at 172-73. The general power to regulate water use is an essential aspect of sovereignty, which is reserved for the States. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977); *United States v. Texas*, 339 U.S. 707, 717 (1950). The States therefore retain "total authority over [their] internal waters," except where the federal government has reserved specifically enumerated powers, such as the power to regulate navigation. *California v. United States*, 438 U.S. 645, 662 (1978) (citing *Rio Grande Dam & Irrigation*, 174 U.S. at 709). For all purely intrastate waters, federal authority is limited to protecting navigability or to protecting other specific federal interests that are related to the flow of water through the channels of interstate commerce and their tributaries. *See, e.g., Appalachian Elec. Power Co.*, 311 U.S. at 423-26 (discussing federal authority to regulate hydroelectric power plants in light of their nexus with the flow of water in the navigable waters); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (discussing federal authority to regulate water use in connection with the reclamation of water resources in arid western states, in light of the nexus between reclamation projects and the preservation of the flow of water in interstate waters); *see, generally*, Roderick E. Walston, *The Federal Commerce & Navigation Powers:* Solid Waste Agency of Northern Cook County's *Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, (2002). The federal government's "domination over the water power inherent in the flowing stream" of the navigable waters entails that the federal navigation power may extend to some non-navigable tributaries of the navigable waters because such tributaries may play an important role in determining the capacity and volume of the navigable

waters. *Appalachian Elec. Power*, 311 U.S. at 424. Nevertheless, this extension of federal authority must be carefully drawn to avoid unnecessary incursions upon the States' primary power to regulate land and water use. *See California*, 438 U.S. at 645. In general, the federal government may regulate the intrastate non-navigable tributaries of navigable waters but only insofar as it is necessary to protect the integrity of the aquatic system that constitutes the navigable waters. *See Appalachian Elec. Power*, 311 U.S. at 423-26.

Given these limitations, the waters of the United States that are subject to federal authority cannot ever include any body of water that lacks a physical connection to the navigable waters. An intrastate body of water that lacks such a physical connection, via surface or ground water, cannot have any effect on the flow of water in the navigable waters and, therefore, cannot be subject to federal authority. If the federal government were to exercise authority over a hydrologically isolated, intrastate water, such an exercise would not serve any of the specifically enumerated federal powers which implicate the navigable waters, and it would intrude on an essential aspect of state sovereignty – the power to regulate water use.

Indeed, this Court has specifically recognized that the federal authority over "navigable waters" cannot extend to any intrastate body of water that lacks a hydrological connection with the "navigable waters." In *The Montello*, 78 U.S. (11 Wall.) 411 (1870), this Court considered whether the Fox River in Wisconsin could be classified as a navigable water and could, therefore, be subject to the federal navigation power. In answering this question, this Court determined that the federal authority over the

navigable waters cannot extend beyond the system of interconnected waters that form "a continued highway over which commerce is or may be carried on with other States or foreign countries." *The Montello*, 78 U.S. at 415. In particular, this Court noted that an intrastate water:

> can only be deemed a navigable water of the United States when it forms, by itself, or *by its connection with other waters*, such a highway. . . . If, however, the river is not itself a highway for commerce with other States or foreign countries, or does not form such a highway *by its connection with other waters* . . . then it is not a navigable water of the United States . . . .

Id. (citation omitted) (emphasis added).

The same principle about the necessity of a hydrological connection that would prevent a purely intrastate river, lake, or stream from being classified as one of the navigable waters should also apply to a wetland. Indeed, this Court has recognized the application of this principle to wetlands when it held that the CWA applied to wetlands only to the extent that they are "inseparably bound up" with the waters of the United States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Thus, this Court has established that the federal authority over the navigable waters can never extend beyond the boundaries of the continuous, physically integrated aquatic system from which the navigable waters of the United States are derived.

A common-sense reading of the terms "navigable waters" and "waters of the United States" reinforces the proposition that those terms cannot refer to waters

without a physical connection to the channels of interstate commerce. As noted above, when interpreting legal terms of art, this Court looks primarily to the established definition of those terms. *Davis*, 489 U.S. at 813. Nevertheless, the ordinary meaning of those terms is also relevant to their interpretation. *Hubbard v. United States*, 514 U.S. 695, 700 (1995) (determining the meaning of statutory terms by undertaking a "commonsense reading" of those terms alongside an understanding of the specific statutory definitions of those terms). The ordinary meaning of "water" includes not only bodies of water, such as bays, lakes and rivers; it also includes the substance itself. WEBSTER'S NEW COLLEGIATE DICTIONARY (1980) (defining "water," among other things, as "the liquid that . . . forms streams, lakes, and seas" and as "the water occupying or flowing in a particular bed"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed. 1971) (defining "water," among other things, as "the liquid content of a river, inlet, etc. . . ."). Accordingly, the terms "navigable water" and "waters of the United States" denote both the channels of interstate commerce as well as the water flowing through those channels. Because the water in those channels may flow from non-navigable tributaries, the water in those tributaries may, in some circumstances, be included in the definition of "navigable waters" and "waters of the United States." By the same token, a hydrologically isolated, intrastate body of water or wetland cannot be classified as a "navigable water" or "water of the United States" in any respect because the substance flowing in one of those isolated bodies never mingles with the navigable waters of the United States. Given the principle that it is improper to define a statutory

term so broadly that crucial elements of that term lose all of their significance, it is improper to define "navigable water" or "waters of the United States" to include hydrologically isolated bodies of water or wetlands. *SWANCC*, 531 U.S. at 172 ("it is one thing to give a word limited effect and quite another to give it no effect whatsoever").

When the CWA was originally enacted, and when it was amended, Congress certainly knew how to define the statutory terms broadly so that the Act could apply to any water or wetland, even if that water had a tangential, attenuated, or intermittent influence on the channels of interstate commerce – or no influence at all. Because Congress did not use such broad definitions, and because it chose to use terms with a specific and limited meaning, it is impossible to expand the interpretation of those terms beyond their inherent limitations. *See SWANCC*, 531 U.S. at 168 (noting that the Corps initially interpreted the CWA's scope to include only waters that were actually navigable or could be reasonable so made). While the "navigable waters" may include some of their non-navigable tributaries, and while they may include some wetlands that are "inseparably bound up" with them, *Riverside Bayview*, 474 U.S. at 134, they may not, in any event, include a wetland that lacks a hydrological connection with them.

B. The Scope of Federal Authority to Regulate Wetlands under the Clean Water Act as Navigable Waters of the United States.

In two cases within the last twenty years, *Riverside Bayview* and *SWANCC*, this Court has

recognized the principle that the authority created by the CWA extends only to those waters that are "inseparably bound up" with the navigable waters of the United States. These cases have both emphasized that the CWA purports to protect the chemical, physical, and biological integrity of the navigable waters of the United States and that, therefore, the CWA can only regulate those waters and wetlands that have a sufficient, tangible connection with the navigable waters. In *SWANCC*, this Court made a necessary deduction from this principle – that the CWA cannot apply to intrastate ponds or other bodies of water that are hydrologically isolated from the navigable waters. This deduction should govern the crucial issue in this case: whether the CWA applies to hydrologically isolated wetlands.

In *Riverside Bayview*, this Court considered the scope of CWA jurisdiction over wetlands. The general question in that case was whether eighty acres of low-lying, marshy land near Lake St. Clair were covered by the Corps' regulation that defined "waters of the United States" to include wetlands adjacent to the navigable waters. *Riverside Bayview*, 474 U.S. at 123-24. To answer this question, the *Riverside Bayview* Court considered two problems in defining the scope of the CWA. First, it considered whether the Corps had the authority under the CWA to promulgate a regulation defining "waters of the United States" as wetlands that were adjacent to navigable waters. Second, it considered whether a wetland could be classified as "adjacent" for the purposes of the statute when it was inundated or saturated by water from any source or only when it was inundated or saturated by water from the nearby navigable water. The *Riverside Bayview* Court's analysis of these problems confirmed

that the CWA applies no farther than the outer limit of the continuous hydrologic system that constitutes the navigable waters.

In discussing the first problem, the *Riverside Bayview* Court noted that defining the outer limits of the Corps' authority under the CWA must begin with an understanding of the statute's general purpose: "'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Riverside Bayview*, 474 U.S. at 132 (quoting CWA § 101, 33 U.S.C. § 1251). The *Riverside Bayview* Court noted that, to accomplish this purpose, the CWA would have to apply to more than just the navigable waters themselves; it would have to protect at least some of the tributaries that feed the navigable waters because "'water moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source.'" *Riverside Bayview*, 474 U.S. at 133 (quoting S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742). Thus, this Court concluded that the CWA could apply to non-navigable waters and to wetlands adjacent to navigable waters because all of these were, at least in theory, part of the hydrologic systems that determined the chemical, physical and biological integrity of the navigable waters. *Riverside Bayview*, 474 U.S. at 134.

This conclusion about the centrality of protecting hydrologic systems informed this Court's resolution of the second problem: whether the CWA extended only to wetlands that were inundated or saturated by water originating in the near-by navigable water. Because "wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands," this Court concluded that adjacent wetlands were

covered by the CWA, regardless of the source of the water that made them wetlands. *Riverside Bayview*, 474 U.S. at 134. In particular, this Court noted that wetlands could serve important filtering and flood control functions when waters from those wetlands drained into a body of navigable water. *Id.* Accordingly, this Court held that the Corps could define the "waters of the United States" to include wetlands that were adjacent on the basis of the idea that such wetlands were "inseparably bound up" with the navigable waters. *Riverside Bayview*, 474 U.S. at 134-35. Of course, the premise of this conclusion is that CWA jurisdiction over wetlands arises from the tangible connection between such wetlands and the navigable waters.

Given the fact that the wetlands at issue in *Riverside Bayview* were adjacent to an open body of water – Lake St. Clair – and given that those wetlands had a surface water connection with Lake St. Clair,[3] this Court concluded that the case did not implicate the outer limits of federal authority under the CWA, and it did not draw any conclusions about precisely where those limits would be drawn. In particular, it concluded that "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill

---

[3] In *Riverside Bayview*, this Court did not address the factual question whether there was a surface water connection between Lake St. Clair and the wetland; but this Court accepted the district court's factual findings about the circumstances of the wetland, *Riverside Bayview*, 474 U.S. at 130-31, and the district court found that there was, at the very least, an occasional surface water connection between the wetland and Lake St. Clair. *See United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 394-97 (6th Cir. 1984) (discussing the district court's findings), *rev'd*, 474 U.S. 121 (1985).

material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview*, 474 U.S. at 131 n. 8; *see also SWANCC*, 531 U.S. at 187 n. 13 (Stevens, J., dissenting) (discussing *Riverside Bayview* and its reservation of the question whether federal jurisdiction under the CWA extended to "isolated wetlands"). The *Riverside Bayview* Court also noted the difficulty of defining the outer limits of the Corps' authority under the CWA:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily chose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Riverside Bayview, 474 U.S. at 132. Despite this uncertainty about precisely where CWA jurisdiction ended, *Riverside Bayview* nevertheless confirmed the principle that the federal authority over the navigable waters involves the protection of waters and wetlands that are part of a "continuum" of waters that begins with the channels of interstate commerce – that is, an integrated, continuous hydrologic system from which the navigable waters are derived.

In *SWANCC*, this Court refined the principles governing CWA jurisdiction and moved closer to a

definition for the limit of the term "waters of the United States." The *SWANCC* Court applied the principle that federal authority under the CWA could extend to waters that had a physical connection to the navigable waters of the United States. In making this application, this Court rejected the proposition that CWA jurisdiction could be established by a purely ecological connection between a hydrologically isolated intrastate pond and navigable waters. This ruling was entirely consistent with the principle that a physical or hydrological connection is the bare minimum for CWA jurisdiction.

In *SWANCC*, this Court considered the legality of one of the regulations promulgated by the Corps under the Act, the so-called "Migratory Bird Rule." The Migratory Bird Rule defined "waters of the United States" to include any water that served or that might serve as a habitat for migratory birds or endangered species. *SWANCC*, 531 U.S. at 164 (discussing 51 Fed. Reg. 41217). The Corps defended this regulation as being properly within the scope of the Act's authority because the protection of such habitats was necessary for the preservation of the ecological integrity of aquatic ecosystems. *See id.* The Corps also contended that Congress had acquiesced to the Corps' conclusion that "waters of the United States" could extend beyond the established limits for the federal power over navigation to include isolated, non-navigable, intrastate waters that had an ecological connection to navigable waters, such as providing a habitat for species that also inhabited the navigable waters. *SWANCC*, 531 U.S. at 168-69. In this respect, the Corps contended that this Court's decision in *Riverside Bayview* should be read to allow the regulation of any body of water, as long as such a regulation was undertaken for the same

ecological purposes that would animate the regulation of the navigable waters. *See Riverside Bayview*, 474 U.S. at 134-35.

This Court rejected the Corps' position that federal authority under the Act could extend to protect ecological connections between intrastate waters and waters of the United States. *SWANCC*, 531 U.S. at 171-72. The foundation of this Court's reasoning was that the fundamental purpose of the Act was to protect waters and aquatic ecosystems, including wetlands, that had a "significant nexus" with navigable waters. *SWANCC*, 531 U.S. at 167. Consequently, this Court held that wetlands were subject to regulation under the Act to the extent that they were "'inseparably bound up'" with the "waters of the United States." *Id.* (quoting *Riverside Bayview*, 474 U.S. at 134). By employing this concept of an inseparable connection, this Court's opinion in *SWANCC* resonates with the long line of case law establishing that federal authority over navigable waters cannot extend to waters that lack a physical connection with the navigable waters. Thus, this Court repudiated the proposition that federal jurisdiction could be based solely upon an ecological connection between a wetland and a navigable water. This Court's ruling established that the preservation of habitat for migratory birds had no proximate effect on the preservation of navigable waters and therefore could not be a sufficient basis for the exercise of CWA jurisdiction. *SWANCC*, 531 U.S. at 174. Indeed, in his dissenting opinion, Justice Stevens concluded that the opinion in *SWANCC* led directly to this conclusion. *See SWANCC*, 531 U.S. at 176 n. 2 (Stevens, J., dissenting).

Thus, *Riverside* Bayview and *SWANCC* establish the proposition that wetlands have a significant nexus with the navigable waters when they

are "inseparably bound up" with those waters because, at a minimum, they have a hydrological connection via ground or surface water with the navigable waters of the United States. A wetland that lacks such a hydrological connection, such as the one at issue in this case, has precisely the same relationship to the waters of the United States as the man-made ponds in *SWANCC*, which were found to be outside of the scope of the Act's authority.

C. Because the Meaning of the Statutory Terms "Navigable Water" and "Waters of the United States" are Clear, The Corps Has No Discretion to Define Those Terms to Include Waters That Lack a Hydrological Connection to the Waters of the United States.

Despite the clear, unambiguous meaning of the CWA's jurisdictional terms, the Corps insisted in this case – as it did in *SWANCC* – that it was entitled to judicial deference in its construction and application of those terms. In reviewing the Corps' application of § 328.3(a)(7) to the property, the Sixth Circuit agreed, concluding that, under the principles set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was required to defer to the Corps. Pet. App. 6a-7a. Deference to the Corps regarding CWA jurisdiction was misplaced for two reasons: (1) because, as explained above, the Corps' interpretation and application of the Act in this case is flatly contrary to Congress' clearly stated intention that jurisdiction under the Act should not extend any farther than the limit of Congress' navigation power; and (2) because judicial deference is

not warranted when an agency decision implicates the outer limits of federal authority under the Commerce Clause.

When an administrative agency interprets a statute for the purpose of resolving a particular issue, *Chevron* prescribes that a reviewing court engage in a two-part inquiry to determine whether and to what extent the agency's interpretation warrants deference. *Chevron*, 467 U.S. at 842-43. First, the court examines the statutory text to determine whether Congress directly addressed the issue in question. *Id.* If the statute includes a clear statement of congressional intent regarding the issue, the court does not defer to the agency in any way but, instead, gives effect to that clear statement and ends its inquiry. *Id.* If the statute is silent or ambiguous about the issue, the court proceeds to the second part of its inquiry, considering whether the agency's resolution of the issue is based upon a permissible construction of the statute. *Id.*

When the Corps relied upon its regulation at § 328.3(a)(7) to assert jurisdiction over the wetland here, it addressed the issue whether the Act extends federal authority to isolated, intrastate wetlands. But this Court has already held that the Act unambiguously resolved that issue. In *SWANCC*, the Corps argued that Congress did not address the precise question of § 404(a)'s scope with regard to non-navigable, isolated, intrastate waters and that it was entitled to deference in its construction of § 404(a) to resolve that question. *SWANCC*, 531 U.S. at 172. This Court squarely rejected that argument, however, concluding that "[w]e find § 404(a) to be clear" and ruling that an isolated, intrastate pond was not within the scope of the Act. *Id.* As noted above, the clarity of § 404(a) is the product of its use of the well-established concept of "navigable

waters," which cannot be interpreted to include any body of water that is hydrologically isolated from the channels of interstate commerce. Because § 404(a) is so clear on the central issue in this case, there is no need for deference to the Corps' own assessment of the extent of its authority under the Act.

Deference to the Corps' jurisdictional analysis in is unwarranted for another reason that was relevant to this Court's ruling in *SWANCC* and that is, in effect, a special case of *Chevron*'s "clear statement" rule. In *SWANCC*, this Court invoked the principle that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bld'g & Constr. Trades Council*, 485 U.S. 568 (1988)). This principle is derived both from this Court's "prudential desire not to needlessly reach constitutional issues" and from its "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-73. This principle applies with special force when the administrative interpretation would alter the traditional balance between federal and state authority. *SWANCC*, 531 U.S. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).

This principle is particularly important in the context of balancing state and federal prerogatives over the control of intrastate waters. This Court has held that the federal government must defer to state authority over such waters, unless there is a clear directive from Congress that would require the overriding of state law. In *California v. United States*, 438 U.S. 645 (1978), this Court considered whether

federal agencies were required to adhere to state laws regarding water use when those agencies acted to fulfill the purposes of § 8 Reclamation Act of 1902, 32 Stat. 390, as codified 43 U.S.C. §§ 372, 383. This Court held that those agencies were bound by state law in the absence of any clear, contrary provision in the relevant federal statute. *California*, 438 U.S. at 674-75. Moreover, this Court also noted that federal deference to state rules was particularly appropriate where the federal statute "makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675. Although the *California* Court did not specifically invoke the same reasons identified in *SWANCC* for withholding deference to administrative agencies, it did employ the same fundamental principle, concluding that federal agencies may not intrude upon the States' prerogatives in the regulation of water use unless Congress has clearly and specifically directed such agencies to do so through the text of a statute.

This principle applies to the Clean Water Act for two reasons, in addition to the reasons discussed in *SWANCC*. First, it applies because the CWA, as with the Reclamation Act, unambiguously expresses Congress' intention that the federal government should give precedence to the States' primary power over water use. *See* 33 U.S.C. § 1251(b). Second, it also applies because, as previously discussed, the CWA arises from the federal navigation power, which carries with it an inherent limitation that mandates deference to state authority regarding water regulation. Consequently, the CWA presents a circumstance in which there are especially powerful reasons to depend upon the principle that the federal courts need not defer to an agency's statutory interpretation, when that

interpretation would infringe upon the ability of state governments to control water use within their borders.

D. The Overwhelming Majority of Federal Courts Have Required a Hydrological Connection as a Necessary Condition for Establishing Clean Water Act Jurisdiction.

Since this Court's opinion in *SWANCC*, numerous courts have addressed the question of CWA jurisdiction over wetlands, and the overwhelming majority of those courts have followed the analysis in *SWANCC* and recognized that the authority created by § 404(a) is limited to wetlands that, at a minimum, have a ground or surface water connection to the navigable waters of the United States. These courts have identified a hydrological connection as the "significant nexus" to the navigable waters that is the necessary condition for creating federal jurisdiction under the CWA. Moreover, these rulings are also consistent with the prevailing analysis of CWA jurisdiction in the federal courts before *SWANCC*, both with respect to wetlands and with respect to other non-navigable tributaries of navigable waters. By contrast, the only federal courts that have not required a hydrological connection as the *sine qua non* of CWA jurisdiction, including the Sixth Circuit here, have not followed *SWANCC*'s reasoning about the limits of the federal navigation power, and they have reflexively and uncritically deferred to the Corps' open-ended understanding of the concept of "adjacent wetlands." In so doing, this judicial minority improperly expanded the scope of federal power and intruded upon the

States' traditional and well-established power to control land and water use.

Following *SWANCC* by focusing on the scope of federal navigation power, the Fourth Circuit has repeatedly identified a hydrological connection between a wetland and navigable waters as the minimum requirement for finding CWA jurisdiction under § 404(a). For example, in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the wetland in question had an intermittent surface water connection extending across thirty-two miles to Chesapeake Bay, via man-made roadside ditches as well as natural bodies of water. *Deaton*, 332 F.3d at 702. The property owner contested the Corps' assertion of jurisdiction over the wetland, citing the tenuous character of the hydrological connection, and arguing that any dredging or filling in his wetland would have no tangible effect on the navigable waters. *Deaton*, 332 F.3d at 705. The Fourth Circuit rejected this argument, however, and held that the wetland was within the authority created by the CWA because the federal government's power to regulate the navigable waters of the United States included the power to prevent any injuries to those waters, which might arise from pollution in the hydrological sources of those waters. *Deaton*, 332 F.3d at 707-08. Similarly, in *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the Fourth Circuit again ruled that a 2.4-mile, intermittent surface water connection between a wetland and a navigable water was sufficient to create the "significant nexus" required by *SWANCC*. *Treacy*, 344 F.3d at 414-18. As in *Deaton*, the Fourth Circuit based this ruling on its analysis of the scope of the federal navigation power. *Id.* Through the analysis in these two cases, the Fourth

Circuit recognized and applied the principle that the federal navigation power extends to any waters that have a physical connection to the navigable waters and, therefore, are part of the same aquatic system.

In two cases decided before its ruling in this case, the Sixth Circuit agreed with the rulings of the Fourth Circuit and analyzed the issue of CWA jurisdiction over a wetland in terms of the existence of a hydrological connection. *See United States v. Rapanos*, 376 F.3d 629 (2004), *cert. granted*, 546 U.S. ___; 126 S. Ct. 414 (2005); *United States v. Rapanos*, 339 F.3d 447 (2003), *cert. denied*, 541 U.S. 972 (2004). Both of the *Rapanos* cases arose from a property owner's decision to drain wetlands on his property, which was located at least eleven miles from the nearest navigable water but was connected to that water by the flow of surface water through several different non-navigable bodies of water. In the criminal case, which was decided first, the Sixth Circuit pointed out that "[t]he evidence presented in this case suffices to show that the wetlands on Rapanos' land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two." *Rapanos*, 339 F.3d at 453. Similarly, in the civil case, which was decided slightly more than two weeks before this case was argued in the Sixth Circuit and which has been consolidated with this case in this Court, the court rejected the property owner's argument that "direct abutment" was required to invoke CWA jurisdiction, holding that "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke [Clean Water Act] jurisdiction." *Rapanos*, 376 F.3d at 642. Thus, in both *Rapanos* cases, the Sixth Circuit relied upon a mode of jurisdictional analysis

that it disregarded in this case, focusing upon the existence of a hydrological connection to determine whether a wetland had a "significant nexus" with the navigable waters.

Other courts, ruling before and after *SWANCC*, have also concluded that the Act extends to wetlands that have, at the very least, a hydrological connection to the "waters of the United States." *See, e.g., United States v. Wilson*, 133 F.3d 251, 258 (4th Cir. 1997) (holding that a district court erred by instructing a jury that the CWA could apply to wetlands that lacked a direct or indirect hydrological connection to the navigable waters); *United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 120-21 (E.D. Mich. 1981).

The Fifth Circuit and one district court have gone even farther in restricting the scope of federal authority over wetlands under § 404(a), holding that the CWA extends only to the navigable waters themselves and to non-navigable waters or wetlands that are immediately adjacent and hydrologically connected to the navigable waters. Nevertheless, these courts still recognize that a hydrological connection with the navigable waters is a necessary, if not sufficient, condition for establishing CWA jurisdiction over wetlands. Construing the CWA for the purpose of applying the Oil Pollution Control Act, the Fifth Circuit has held that *SWANCC* limited federal authority to wetlands that are adjacent to navigable waters. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003). The

Fifth Circuit expressed the principle this way: "a body of water is subject to regulation under the [Clean Water Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. A district court has also followed the Fifth Circuit's reading of *SWANCC*, concluding that even some wetlands that have a hydrological connection to a navigable water may, nevertheless be classified as "isolated" and outside CWA jurisdiction. *FD & P Enters., Inc v. United States Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 514-16 (D. N.J. 2003). According to the *FD & P Enterprises* court, after this Court's ruling in *SWANCC*, it is adjacency to navigable water, along with a hydrological connection, that determines the scope of federal authority. *Id.*

By contrast to all of these opinions, the Sixth Circuit's opinion here marks a dramatic departure from the principles defining the scope of federal authority over navigable waters and from the manner in which the overwhelming majority of federal courts have understood the meaning of "significant nexus." Instead of focusing its jurisdictional analysis on the CWA as an instrument for the exercise of the federal navigation power, and instead of considering whether there was a hydrological connection between the wetland and any navigable water or tributary of a navigable water, the Sixth Circuit focused instead on the wetland's physical proximity to the drainage ditch that was connected to non-navigable tributaries of Lake St. Clair. Pet. App. 9a. Although the Sixth Circuit recognized that the identification of a "significant nexus" was essential to the definition of the scope of federal authority, the court presumed that such a nexus could be established simply by physical proximity and regardless of any ground or surface water connection. Pet. App. 9a-12a.

Only one other circuit court has held that federal jurisdiction under § 404(a) may be found over an adjacent wetland despite the absence of a hydrological connection and solely on the basis of physical proximity. In *Baccarat Fremont Developers v. United States Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), the Ninth Circuit relied heavily upon the Sixth Circuit's decision in this case and held that a wetland would still be considered adjacent to federal waters if it was separated from those waters by a man-made barrier. It concluded that *SWANCC* was not directly relevant to the construction of the concept of adjacency, and that there was no need to find the existence of a hydrological connection as a basis for concluding that a wetland was "adjacent" for the purposes of 33 C.F.R. § 328.3(a)(7). *Baccarat Fremont*, 450 F.3d at 1155-56. According to the Ninth Circuit, the CWA's jurisdictional requirements are satisfied if a wetland is adjacent to a navigable water, regardless of whether that wetland has a hydrological connection with the navigable water. *Id.*; *see also Northern California River Watch v. City of Healdsburg*, 2004 WL 201502, *9 (N.D. Cal. Jan. 23, 2004) (asserting that "*SWANCC* did not impose a rule of 'hydrological connection' . . . .").

The fundamental problem with the reasoning of the Sixth Circuit in this case and the Ninth Circuit in *Baccarat Fremont* is that they simply disregard the essential foundation for determining CWA jurisdiction after *SWANCC*: the identification of a nexus that links the subject of regulation to the navigable waters. As the other authority discussed in this section shows, the minimum requirement of such a nexus is the existence of a hydrological connection between the subject of regulation and the navigable waters, and without such a

connection, there is no statutory basis for the exercise of federal authority under the CWA.

E. Petitioners' Property Is Not Subject to Federal Authority under the CWA Because It Lacks a Hydrological Connection with the Navigable Waters.

The undisputed facts of this case leave no doubt that the wetland on Petitioners' property lacks the requisite nexus with the navigable waters to warrant CWA jurisdiction. Most importantly, the wetland has no hydrological connection to the navigable waters. Because the soil in the wetland is clay, water does not drain from the surface of the wetland to ground water; and it does not run off the surface of the wetland to the drainage ditch that abuts Petitioners' property. J.A. 36a-40a, 82a-83a, 99a-100a, 162a-163a. Moreover, the Corps itself found that the drainage ditch was not a tributary of a navigable water, and that the wetland did not even receive surface water run-off from other properties. J.A. 82a, 97a. In hydrologic terms, the wetland on Petitioners' property could not be more isolated, from the navigable waters of the United States, or from anything else. As a result, there can be no proximate cause between the regulation of the wetland and the protection of chemical, physical, or biological integrity of the channels of interstate commerce. *See* J.A. 35a-37a. Indeed, as the Corps admitted, the wetland has no connection of any kind with interstate commerce, other than the protection of migratory birds, which cannot be a basis for federal authority. J.A. 131a. The state administrative agency here even found that Petitioners' development plan,

with its enhanced wetland, would do more to fulfill the purposes of protecting clean water than the preservation of the property in its current condition. J.A. 35a-37a. In the absence of the barest relationship between Petitioners' property and the navigable waters, it is impossible for the Corps to fulfill the purposes of the CWA by regulating that property, and there is no basis in law for the Corps to exercise jurisdiction over the property. The Sixth Circuit erred in concluding that the CWA could apply to Petitioners' property, and this Court should reverse its judgment.

II. The Extension of Federal Authority Under the Clean Water Act to a Wetland That Lacks a Hydrological Connection with the Waters of the United States Exceeds the Boundaries of Congressional Authority Under the Commerce Clause.

For the reasons stated above, the CWA should be read to prohibit the extension of federal authority over hydrologically isolated wetlands because such an extension exceeds the scope of the federal navigation power, upon which the CWA is based. But even if the CWA is understood to be the product of Congress' more expansive power to regulate activities that substantially affect interstate commerce, the CWA still cannot be interpreted to provide for federal authority over wetlands that lack any ground or surface water connection to the navigable waters of the United States. As this Court held in *SWANCC*, the extension of federal authority to isolated, intrastate waters upsets the traditional balance between the state and federal governments regarding the regulation of land and water uses. Consequently, even if this Court concludes

that the CWA embodies Congress' general commerce power, it cannot be interpreted or applied to provide for the federal regulation of wetlands that lack any physical connection to interstate waters and, therefore, lack any substantial effect on interstate commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), this Court reaffirmed the principles that define the scope of Congress' authority to regulate economic activities that have a substantial effect on interstate commerce. These cases establish that the federal commerce power may not be extended to regulate conduct in legal contexts where the States have traditionally exercised their police power and when the conduct sought to be regulated is not economic activity. When these principles are applied to the regulation of the dredging and filling of wetlands, they mandate the conclusion that the federal commerce power cannot be extended to hydrologically isolated wetlands. *See* Bradford C. Mank, *The Murky Future of the Clean Water Act after* SWANCC: *Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L. Q. 811 (2003); Michael J. Gerhardt, *Federal Environmental Regulation in a Post-*Lopez *World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980 (2000).

The analysis of what Congress may regulate under its Commerce Clause authority begins with the consideration of whether the regulated activity fits into one of "three broad categories of activity:" (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3) the power to regulate those activities having a

substantial relation to interstate commerce. *Lopez*, 514 U.S. at 558-559. In this case, the activity regulated by § 404(a) and § 328.3(a)(7) – the dredging and filling of wetlands – must be classified in the third category if it is to be subject to the general commerce power. As discussed in the previous argument, if the dredging and filling of wetlands relates to the use of the channels of interstate commerce, it involves the federal navigation power, which has its own particular purposes and limits. And in no event can the dredging and filling of wetlands be classified as involving one of the instrumentalities of interstate commerce.

As this Court held in *Lopez*, Congress may regulate activities in the third category if they have a "'substantial economic effect'" on interstate commerce. *Lopez*, 514 U.S. at 556-57 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). To determine which activities have such a substantial effect, a court must further examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute's language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the rationale for upholding the statute extends. *Lopez*, 514 U.S. at 563-64.

A hydrologically isolated wetland, such as the wetland at issue in this case, cannot meet any of these tests for the existence of a substantial effect on interstate commerce. First, the dredging or filling of any wetland, in itself, does not relate to an economic activity. Although a person who dredges or fills a wetland may do so for the ultimate purpose of engaging in an economic activity, the act of dredging or filling is not inherently economic, and neither § 404(a) nor § 328.3(a)(7) distinguishes between dredging or filling

activities that do or do not have an ultimately economic purpose. The statute could be applied with equal force to a developer who sought to dredge or fill a vast area of wetlands as a prelude to building a shopping mall and to a home owner who sought to re-grade and fill a persistently saturated portion of his yard for purely aesthetic purposes. In both *Lopez* and *Morrison*, this Court concluded that Congress exceeded the limits of its authority under the Commerce Clause by attempting to regulate activities that were not inherently economic, even though they might – or might not – have consequences for the national economy. As with the possession of a firearm in a school zone or certain kinds of conduct constituting violence against women, the dredging or filling of a wetland does not necessarily have a commercial purpose, and, as such, it is the sort of conduct traditionally regulated by the police powers of the States, not by the federal power to regulate interstate commerce.

Second, there is nothing in § 404(a) nor § 328.3(a)(7) which constitutes a "jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." *Lopez*, 514 U.S. at 562. Nothing in the CWA itself or in its attendant regulations would give the Corps or any other federal agency a method for distinguishing between wetlands that would substantially affect interstate commerce and wetlands that would not. If, as discussed in the previous argument, the CWA is understood as an exercise of Congress' navigation power, then the term "navigable waters" could be characterized as a jurisdictional element, restricting the scope of federal authority under the CWA to waters that are actually navigable and to waters or wetlands

that are, at the very least, hydrologically connected to the navigable waters. Indeed, the navigation power carries with it an inherent jurisdictional limitation that preserves State authority. *See California v. United States*, 438 U.S. 645, 662 (1978) (citing *Rio Grande Dam & Irrigation*, 174 U.S. at 709). If, however, the CWA is understood as an exercise of the general commerce power, there is nothing in the language of either the statutes or the regulations that would facilitate a jurisdictional limitation on the exercise of federal authority.

Finally, there is no cogent rationale for permitting the extension of federal authority under the CWA to wetlands without any hydrological connection to the navigable waters of the United States. Given that there is no flow of surface or ground water between the wetland in this case and any navigable water, there are only the most attenuated reasons for exercising CWA jurisdiction over the wetland. Preserving the wetland in its current condition will not prevent pollution in Lake St. Clair because the wetland is disconnected from the Lake St. Clair watershed and therefore cannot serve any filtering function for that navigable water. *See* J.A. 37a, 97a, 99a. In the administrative proceedings, the Corps suggested that, even without a hydrological connection, the wetland served flood control and water storage functions, preventing run off from other areas from entering the Lake St. Clair watershed, but the extent and importance of such functions are purely speculative. Indeed, there was no dispute in the administrative record that the wetland did not receive surface water run-off from neighboring properties, *see* J.A. 97a, so the flood control capacity of the wetland here was entirely a matter of conjecture. Moreover, if the federal

government could have jurisdiction over any piece of property which, if developed, might change the dynamics of surface water flow and flood control, then the scope of federal authority would be extraordinarily broad and would interfere with the States' ability to fulfill their core function as the primary regulators of land use. In short, giving the Corps authority to regulate land on the basis of *potential* hydrological connections would, in effect, give the federal government police power over land use, which would equal or exceed the police power of State governments. Such a profound intrusion by the federal government into the power traditionally vested in the States weighs heavily against the conclusion that the regulation of hydrologically isolated wetlands is necessary and proper to protect interstate commerce. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997).

Indeed, this case precisely demonstrates the nature of such an intrusion. Before the Corps ever considered exercising its authority over the wetland here, the Michigan Department of Environmental Quality (MDEQ) granted Petitioners' state-law application to develop the property. In making its decision, the MDEQ evaluated a variety of ecological factors, particularly whether and to what extent the filling of the wetland on the Petitioners' property might affect the Lake St. Clair watershed. After this consideration, it was the judgment of the authorized state agency that petitioners' proposed use of the property would not adversely affect any of the state's interests. In particular, the state officials considered issues relating to flood control, especially because the wetland is close to the drain system for Macomb County. J.A. 36a-40a. In this respect, the contrast between the decision-making of the federal and state

agencies is instructive. The state agency approved Petitioners' development plan after focusing on issues of central importance to the use and protection of Lake St. Clair. In fact, the state agency concluded that the enhanced wetland that was a part of Petitioners' development plan was more likely to serve water filtering functions than the wetland in its current condition. J.A. 35a. The Corps, on the other hand, devoted less attention to issues of pollution effects and more attention to questions about whether the proposed condominium development was really necessary for the local economy. J.A. 115a-116a. Most tellingly, the Corps even acknowledged that the wetland had no meaningful connection with interstate commerce, except as a habitat for migratory birds. J.A. 131a. In this respect, the state agency functioned more like a body concerned with pollution control and the federal agency functioned like a super-zoning board. The Commerce Clause simply does not give federal agencies the authority to engage in this kind of decision-making. Given that the wetland here has no demonstrable connection to any interstate water or to anything else that would substantially affect a federal interest, it is inconsistent with the fundamental principles underlying the Commerce Clause for the federal government to regulate this wetland, or any other wetland that lacks a hydrological connection to the waters of the United States.

CONCLUSION

Although it is broad, federal authority under the Commerce Clause does not have an unlimited scope. In this case, the Corps exceed the scope of this authority by denying the Petitioners a permit to fill their wetland

under § 404(a) of the CWA. Petitioners' wetland does not have any physical connection to the navigable waters of the United States, and, therefore, it cannot substantially affect either the channels of interstate commerce or interstate commerce itself. By asserting its authority over the wetland on Petitioners' property, the Corps exceeded the limits of federal power and intruded into an area reserved for the exercise of state police power. This Court should reverse the judgment of the Sixth Circuit and rule that the lower courts erred by failing to recognize that the CWA does not permit the regulation of hydrologically isolated wetlands.

DATED: December 2, 2005

Respectfully Submitted,

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
Dickinson Wright PLLC
500 Woodward Avenue,
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Attorneys for Petitioners

32

Supreme Court, U.S.
FILED
JAN 13 2005
OFFICE OF THE CLERK

No. 04-1384

In the Supreme Court of the United States

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
GREER S. GOLDMAN
ELLEN J. DURKEE
TODD S. KIM
KATHERINE W. HAZARD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the United States Army Corps of Engineers acted reasonably in interpreting the term "waters of the United States" as it appears in the Clean Water Act (CWA), 33 U.S.C. 1362(7), to encompass a wetland that is "adjacent" to, but separated by a narrow man-made berm from, a tributary that is covered by the CWA.

2. Whether the application of the CWA to the wetland at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Summary of argument 13
Argument:
The Corps has acted lawfully in defining the term "adjacent wetlands" to include wetlands that are physically adjacent to other waters covered by the CWA but are separated from those waters by a berm or similar feature 16
A. The Corps' assertion of CWA permitting authority over petitioners' wetlands is reasonable and consistent with the Act 18
1. The record does not support petitioners' claim that no hydrologic connection exists between their wetland and the adjacent tributary 19
2. The conclusion that the CWA encompasses "adjacent wetlands" as defined in the agencies' regulations is consistent with the statutory text and with this Court's construction of the CWA 21
3. CWA coverage of wetlands separated from "adjacent" waters by berms or dikes is supported by scientific evidence and agency experience demonstrating the interrelated nature of such adjacent waters 25
4. The Corps and EPA have permissibly adopted a classwide, categorical approach in defining the categories of waters encompassed by the CWA 29
5. Proof of a hydrologic connection between wetlands and adjacent waters is not a pre-requisite to the exercise of regulatory authority under the CWA 32

Table of Contents—Continued: Page

B. Application of the CWA to wetlands separated by a berm or similar feature from other waters covered by the Act is a permissible exercise of congressional power under the Commerce Clause 38

Conclusion 41

TABLE OF AUTHORITIES

Cases:

Gonzales v. *Raich*, 125 S. Ct. 2195 (2005) 39, 40, 41

Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) 17

McDermott Int'l, Inc. v. *Wilander*, 498 U.S. 337 (1991) 24

Needham, In re, 354 F.3d 340 (5th Cir. 2003) 17

Parker v. *Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004) 17

Rapanos v. *United States*, cert. granted, No. 04-1034 (Oct. 11, 2005) 16

Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 5, 6, 7, 21, 24, 31

South Florida Water Mgmt. Dist. v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) 27

Thomas v. *Arn*, 474 U.S. 140 (1985) 38, 39

Treacy v. *Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004) 17

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974) 17

Cases—Continued: Page

United States v. *Campbell*, 261 F.3d 628 (6th Cir. 2001) 39
United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004) 17, 22
United States v. *Eidson*, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997) 17
United States v. *Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), petition for cert. pending, No. 05-623 (filed Nov. 11, 2005) 17
United States v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004) 17
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... *passim*
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 38

Constitution, statutes, and regulations:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 17, 38
Clean Water Act, 33 U.S.C. 1251 *et seq.* ..... *passim*
33 U.S.C. 1251(a) 2
33 U.S.C. 1254(n)(4) (Supp. II 2002) 24
33 U.S.C. 1281(n)(2) 24
33 U.S.C. 1285(*l*)(2) 24
33 U.S.C. 1311 35
33 U.S.C. 1311(a) 2
33 U.S.C. 1311(h)(9) 24
33 U.S.C. 1319 35
33 U.S.C. 1329(b)(1) 24
33 U.S.C. 1342 (§ 402) 3
33 U.S.C. 1344 (§ 404) 3, 4, 23

Statutes, regulations and rules—Continued: Page

33 U.S.C. 1344(a) (§ 404(a)) 2, 3
33 U.S.C. 1344(b)(1) 33
33 U.S.C. 1344(g) (§ 404(g)) 3, 24
33 U.S.C. 1344(g)(1) 23
33 U.S.C. 1344(g)-(h) 8
33 U.S.C. 1344(j) 9
33 U.S.C. 1346(a)(1)(A) 24
33 U.S.C. 1346(b)(1) 24
33 U.S.C. 1346(c)(1) 24
33 U.S.C. 1346(d) 24
33 U.S.C. 1346(g)(1) 24
33 U.S.C. 1362(6) 2
33 U.S.C. 1362(7) 2, 4, 21
33 U.S.C. 1362(12)(A) 2
33 U.S.C. 1362(21)(b)(ii) 24
Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 note) 2
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 2
33 U.S.C. 1272(a) 24
33 C.F.R.:
Section 320.1(a)(1) 33
Section 320.1(a)(6) 35
Section 320.4(a) 33
Section 320.4(b)(2)(v) 28
Section 320.4(d) 33
Section 320.4(*l*) 33
Section 320.4(o) 33

Regulations—Continued: Page

Section 325.9 35

Section 328.3(a) 4

Section 328.3(a)(1) 4

Section 328.3(a)(7) 13

Section 328.3(b) 4

Section 328.3(c) 4, 16, 22, 25, 35

Section 331.2 35

40 C.F.R.:

Pt. 230:

Section 230.3(s)(1) 4

Pts. 230-233 33

Pt. 233:

Section 233.70 8

Miscellaneous:

Mark M. Brinson et al., *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* (1995) <http://el.erdc.usace.army.mil/wetlands/pdfs/wrpdell.pdf> 34

123 Cong. Rec. (1977):

p. 26,718 23

p. 38,968 23

Lewis M. Cowardin et al., *Classification of Wetlands and Deepwater Habitats of the United States* (1979) 33

Environmental Hydrology (Andy D. Ward & William J. Elliot eds. 1995) 34

Miscellaneous—Continued: Page

Federal Energy Regulatory Comm'n, *Engineering Guidelines for the Evaluationof Hydropower Projects* (2005) <http://www.ferc.gov/industries/hydropower/safety/eng-guide/chap.14.pdf> 26, 27

42 Fed. Reg. (1977):

p. 37,128 ..... 25, 36

p. 37,144 23

International Atomic Energy Agency, *Fact Sheet on Investigating Leaks in Dams and Reservoirs* (visited Jan. 11, 2006) <http://www-tc.iaea.org/tcweb/publications/factsheets/sheet20dr.pdf> 26

National Research Council:

Compensating for Wetland Losses Under the Clean Water Act (2001) <http://www.nap.edu/books/0309074320/html> 28

Riparian Areas: Functions and Strategies for Management (2002) <http://222.nap.edu/books/030908295/html> 28

San Francisco Bay Area Wetlands Ecosystem Goals Project, *Baylands Ecosystem Habitat Goals* (1999) <http://www.abag.ca. gov/bayarea/sfep/reports.htmlcalif> 29

R. Daniel Smith & Charles V. Klimas, *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valley* (2002) <http://el.erck.usace.army.mil/wetlands/pdfs/tre102-4.pdf> 28

Miscellaneous—Continued: Page

U.S. Army Corps of Engineers:

Design and Contruction of Levees (2000) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1913/entire.pdf> 27

Design, Construction, and Maintenance of Relief Wells (1992) <http://www.usace.army.mil/inte/usace-docs/eng-manuals/em110-2-1914/entire.pdf> 26, 27

Engineering and Design: Design Guidance for Levee Underseepage (2005) <http://www.usace.army.mil/usace-docs/eng-tech-ltrs/etl1110-2-569/entire.pdf> 27

General Design and Construction Considerations for Earth and Rock-Fill Dams (2004) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-2300/entire.pdf> .. 26, 27

Regulatory Program: All Permit Decisions, FY 2003 (visited Jan. 11, 2006) <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf> 34

Seepage Analysis and Control for Dams (1986) <http://www.usace. army.mil/inet/usace-docs/eng-manuals/em1110-2-1901/entire.pdf> 26, 27

U.S. Bureau of Reclamation, Provo Office, *Safety of Dams* (visited Jan. 11, 2006) <http://www/usbr.gov/uc/provo/progact/damsafety.html> 26

In the Supreme Court of the United States

No. 04-1384

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 391 F.3d 704. The opinion of the district court (Pet. App. 15a-17a) and the report and recommendation of the magistrate judge (Pet. App. 20a-57a) are reported at 257 F. Supp. 2d 917.

JURISDICTION

The court of appeals entered its judgment on September 27, 2004. A petition for rehearing was denied on January 10, 2005 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on April 11, 2005 (a Monday), and was granted on October 10, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).